



1963

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Recommended Citation

Yabuda Savir, *The Definition of a Jew under Israel's Law of Return*, 17 Sw L.J. 123 (1963)
<https://scholar.smu.edu/smulr/vol17/iss1/9>

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THE DEFINITION OF A JEW UNDER ISRAEL'S LAW OF RETURN

*Yehuda Savir**

A question not easily resolved is, What is the definition of a Jew? Do all of the religious sects in the world that claim to be Jews enjoy such a status? What about a person who is born as a Jew and later converts to another religion?

The legal problem of defining who is considered to be a Jew arises because of the unique nature of the State of Israel. The difficulty is caused in part by the lack of clarity and certainty concerning the legal and extra-legal relationships between the Jewish religion and that State. For instance, although Israel makes no distinction between Jews and non-Jews with respect to internal administration, in the area of immigration and naturalization a Jew has a slight advantage over a non-Jew.¹ Thus, in that area, at least, a line of demarcation must be drawn.

The necessity of making a legal distinction between a Jew and a non-Jew was recently forced upon the courts of Israel. A case arose involving a person who had been raised under the standards of the Jewish religion but who had converted to Catholicism.² Later, when a Carmelite Friar, he sought immediate citizenship rights in Israel as a "Jew."

The purpose of this paper is to present and analyze the decision in the case of Father Daniel, the converted "Jew." Since the problem presented—that of legally defining the term "Jew"—may affect the rights of many people, it is hoped that the reader will realize the importance of that decision.

I. BACKGROUND

A. *Lack Of A Legislative Definition*

Although the word "Jew" appears in many laws of the State of Israel, the Knesset (Israeli Parliament) has never defined the term in any of those enactments. This conspicuous silence has produced ambiguity and vagueness in legislative interpretation, since the term

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¹ See footnotes 8-21 *infra* and accompanying text.

² The full text of the case has not yet been published in Hebrew or in English. Excerpts from the case which appear in the paper are taken from the reports in Lamerhav, Dec. 7, 1962, p. 10, and Time Magazine, Dec. 7, 1962, p. 54; Dec. 14, 1962, p. 60; Dec. 21, 1962, p. 11.

can be defined in any one of the following ways: (1) one becomes a Jew by birth; (2) one becomes a Jew by religious observance; or (3) one becomes a Jew by mere inclination. Unfortunately, the Parliament is not likely to adopt one or the other of these concepts because of the fear of undesirable, internal, political consequences.³

B. Position Of The Religious Authorities

Presently, the religious (rabbinic) courts⁴ in Israel resolve the problem of classifying Jews and non-Jews according to Jewish canon law. Thus, persons who were persecuted in Germany as "Jews" because of some degree of affinity with a member of the Jewish religion, and persons adhering to contemporary liberal Judaism, would not necessarily qualify as Jews from the standpoint of the canon law.

On the other hand, many authorities on the Jewish religion maintain that once a person is considered to be a Jew, he does not cease to be a Jew, *i.e.*, a member of the covenant made between God and Israel at the time of the Revelation, because of his heresy or non-observance of the religious law.⁵ Accordingly, in the absence of one's rejection of Judaism by affiliation with another faith, other Jews are bound to regard him as one of their own faith and to permit his return to its practice and beliefs.⁶

The extent to which even conversion to another faith affects the status of an individual within Judaism is a subject of considerable discussion in rabbinical literature. Many authorities consider such a person a Jew despite his conversion. The prevailing opinion, however, apparently recognizes as effective the voluntary separation of a person from the Jewish religion.⁷

C. Relationship Of The Jewish Religion To The State Of Israel In The Area of Immigration

The singular nature of Israel, which by definition is a Jewish state, inherently endows Jews all over the world with certain prerogatives which do not belong to non-Jews. These privileges were stated direct-

³ Adoption of any of the suggested definitions by the Knesset could cause the dissolution of the Israeli coalition government, composed of both secularists and religious ministers representing religious parties. The supporting vote of each group is essential for the government now headed by Mr. Ben Gurion.

⁴ See The Rabbinical Court's Jurisdiction (Marriage and Divorce) Law No. 5713, § 2 (1953), in Badi, *Fundamental Laws of the State of Israel* 314 (1961); The Palestine Orders-in-Council No. 1922, art. 53 (1947); Baker, *The Legal System of Israel* 93, 115-16 (1961); Bentwich, *The Application of Jewish Law in Palestine*, 9 J. Comp. Leg. & Int'l L. (3d ser.) 59 (1927); Silberg, *Law and Morals in Jewish Jurisprudence*, 75 Harv. L. Rev. 306 (1961).

⁵ See Finkelstein, Ross & Brown, *The Religions of Democracy* 29 (1943).

⁶ *Id.* at 14.

⁷ *Ibid.*

ly or were implied in such international documents and proclamations as the League of Nations Mandate for Palestine⁸ and the United Nations General Assembly resolution recommending the establishment of a Jewish state.⁹ They were asserted in Israel's Proclamation of Independence, which set forth the establishment of a Jewish state "open to Jews from all countries of their dispersion."¹⁰

Perhaps the most significant enactment of the Israeli Legislature during its first decade was the 1950 "Law of Return,"¹¹ which embodies the fundamental concept underlying the establishment of that nation. More specifically, the Law of Return grants every Jew in the world the absolute right to come to Israel as an immigrant.¹² To receive an immigrant's visa, a Jew merely needs to express the desire to settle in Israel. Only if the Minister of the Interior is satisfied that the applicant is acting against the interests of the Jewish people, is likely to endanger public health or the security of the state, or has a criminal past which is likely to endanger the public peace, is the visa denied.¹³ If a Jew decides to settle in Israel when he is already visiting there, he may be granted an immigrant's "certificate," which

⁸ Peretz, *Israel and the Palestine Arabs* 121-23 (1958); see also *Israel Government Year-book* No. 5713, at 207-10 (1952).

⁹ Peretz, *op. cit. supra* note 8, at 123.

¹⁰ *Id.* at 121.

¹¹ Law of Return No. 5710 (1950), in Badi, *op. cit. supra* note 4, at 156:

1. Every Jew has the right to come to this country as an *oleb*.
2. (a) *Aliyah* shall be by *oleb's* visa.
 - (b) An *oleb's* visa shall be granted to every Jew who has expressed his desire to settle in Israel, unless the Minister of the Interior is satisfied that the applicant —
 - (1) is engaged in an activity directed against the Jewish people; or
 - (2) is likely to endanger public health or the security of the State; or is a person with a criminal past, likely to endanger public welfare.
3. (a) A Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may, while still in Israel, receive an *oleb's* certificate.
 - (b) The restrictions specified in section 2 (b) shall apply also to the grant of an *oleb's* certificate, but a person shall not be regarded as endangering public health on account of an illness contracted after his arrival in Israel.
4. Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an *oleb* under this Law.
5. The Minister of the Interior is charged with the implementation of this Law and may make regulations as to any matter relating to such implementation and also as to the grant of *oleb's* visas and *oleb's* certificates to minors up to the age of 18 years.

(*Aliyah* means immigration of Jews, and *oleb* (plural *olim*) means a Jew immigrating into Israel.)

¹² Badi, *op. cit. supra* note 4, at 4.

¹³ See Badi, *op. cit. supra* note 4.

carries the same rights and obligations as the visa.¹⁴ Thus, under the Law of Return, immigration by a Jew is an automatic right.

The other major enactment governing Israel's immigration policies is the Nationality Law of 1952.¹⁵ That Law provides for the acquisition of citizenship by Jewish and non-Jewish residents in one of four ways: (1) by virtue of return (This section is complimentary to the Law of Return.);¹⁶ (2) by residence in Israel;¹⁷ (3) by birth;¹⁸ or (4) by naturalization.¹⁹ To become a citizen by naturalization, a person must be at least eighteen years of age and must fulfill several conditions.²⁰ However, according to section 6(d) of the Nationality Law, the Minister of the Interior, who is charged with implementing the act, may, if in his opinion there is a special reason, exempt an applicant for naturalization from all but two of those conditions: (1) that the applicant be entitled to reside permanently in Israel, and (2) that he be settled or intend to settle in Israel.

The Nationality Law and the Law of Return are not wholly diverse pieces of legislation, but rather, they are complimentary.²¹ The Law of Return gives a Jew the automatic right to immigrate to Israel, and the Nationality Law immediately bestows citizenship upon such person.

II. THE CASE OF FATHER DANIEL

A. Facts

From his childhood days in Poland until the time of World War II, Oswald Rufeisen was an active member of the Zionist movement. During the early stages of the War, he had, on several occasions, saved numerous Jews from the cruelties practiced by the Nazis dur-

¹⁴ Baker, *op. cit. supra* note 4, at 115.

¹⁵ Nationality Law No. 5762 (1952), as amended, No. 5718 (1958), in Badi, *op. cit. supra* note 4, at 254, 410.

¹⁶ Nationality Law No. 5712, § 2 (1952), as amended, No. 5718 (1958).

¹⁷ Nationality Law No. 5712, § 3 (1952), as amended, No. 5718 (1958).

¹⁸ Nationality Law No. 5712, § 4 (1952), as amended, No. 5718 (1958).

¹⁹ Nationality Law No. 5712, §§ 5-9 (1952), as amended, No. 5718 (1958).

²⁰ The conditions that an applicant must meet are: (1) he has to have resided in Israel for three out of the five years preceding his application; (2) he must be entitled to reside in Israel permanently; (3) he must have settled or intend to settle in Israel; (4) he must have some knowledge of the Hebrew language; and (5) he must renounce his prior nationality or have proved that he will cease to be a foreign national upon becoming an Israeli national. After he has fulfilled all of these conditions, the applicant must then make a declaration that he will be a loyal national of the State of Israel. His acquisition of nationality will become effective as of the date of that declaration. See Nationality Law No. 5712, § 5 (1952), as amended, No. 5718 (1958).

²¹ As Prime Minister Ben Gurion noted: "These two laws together . . . are the 'charter' which we have promised to every Jew in exile, who comes to the State of Israel. . . . [The laws confirm that] this is not only a Jewish state, where the majority of the inhabitants are Jews, but a state for all Jews, wherever they are, and for every Jew who wants to be here. . . . This right is inherent in his being a Jew." Peretz, *op. cit. supra* note 8, at 122.

ing their occupation of Poland. However, while in hiding in a convent during that occupation, he was baptized by the nuns. Some time later, he joined the Carmelite Order in Poland and, subsequently, gave up his Polish passport to Israel.

In 1959, Father Daniel, the Carmelite Friar that Oswald Rufeisen became upon his conversion, sought to be admitted to Israel under the 1950 Law of Return, which, as mentioned, permits any "Jew" in the world to immigrate to Israel as a matter of right. Father Daniel did not apply for naturalization under the Nationality Law of 1952.²²

In spite of the fact that neither the Parliament nor the courts had espoused any definition of a Jew, the Immigration Authorities did have a written exposition of the term. In an administrative order used solely for their purposes, the Authorities defined a Jew as "any person who professes to be one and [who] has not embraced any other religion."²³ That interpretation would have classified as a Jew Oswald Rufeisen, the Jew by birth, but it excluded Father Daniel, the Carmelite Friar. When the Authorities refused to admit Father Daniel as a "Jew" under the Law of Return, he sought review before the Supreme Court of Israel.

B. Arguments

According to the Jewish religion, a Jewish sinner, a Jew violating the Ten Commandments, or one breaking the law, is a "bad" Jew, but he is, nevertheless, still a Jew. In his argument to the high court, Father Daniel adopted that approach. He admitted that his religion was Catholic, but he insisted that he was still a Jew, stating "my ethnic origin is and always will be Jewish. I have no other nationality. If I am not a Jew, what am I? I did not accept Christianity to leave my people. I added it to my Judaism. I feel as a Jew."²⁴

The tenor of his argument was that even if a person believed in the tenets of Christianity, he still might consider himself to be a Jew. A similar position is often taken by organizations devoted to converting Jews to Christianity (like the International Board of Jewish Missions in Atlanta).²⁵ Consistent with the views of such groups, Father Daniel apparently conceived of his "Judaism" as "the kind of Judaism in which Jesus and his followers believed . . . , [which is] the true, original, God-given Judaism."²⁶ Finally, Father Daniel contended that if the State of Israel considered atheists to be Jews, cer-

²² These facts are taken from Lamerhav, Dec. 7, 1962, p. 10.

²³ See Time Magazine, Dec. 7, 1962, p. 54.

²⁴ Time Magazine, Dec. 7, 1962, p. 54.

²⁵ See Time Magazine, Dec. 21, 1962, p. 11.

²⁶ *Ibid.*

tainly there was no logic in refusing to regard converted "Jews" as also encompassed by that term.

The State Attorney's position was simply stated: "[I]t is not enough for the applicant to say he feels 'Jewish,' for 'Jewishness is not a club based on feelings.'"²⁷ He cited authorities from the Talmud to St. Augustine and argued that though an *Israeli* may be a Christian, Moslem, or atheist, the term "Jew" excluded the possibility of belonging to any other religion. The State Attorney felt that the distinguishing characteristic of a Jew was a common culture, and the Jewish religion, whether observed or not, was the basis of that culture.

C. *The Decision*

The construction of Father Daniel's status under the Law of Return presented the Supreme Court of Israel with a task certain to produce unpopularity regardless of its outcome. Some elements would consider a decision that he was a Jew catastrophic to world Judaism. Conversely, exclusion of Father Daniel from Israel would lend considerable weight to the argument of non-Jews within and without that nation that the state was a theocracy.

In the face of possible political repercussions, and despite the equities of Father Daniel's case, the court by a four to one decision held that a Roman Catholic could not simultaneously be a Jew as defined by the Law of Return. The court recognized that Father Daniel might be considered a "Jew" under the rabbinical interpretations of the Jewish Halakah (religious book of law). However, all five justices concurred that construction of the term "Jew" should be according to secular principles, because the Law of Return was obviously secular legislation. Accordingly, the court found that consistent with the commonly accepted definition of the term, one who had converted to another religion was no longer a Jew. Writing for the court, Justice Moshe Silberg stated:

From the extreme Orthodox to complete freethinkers, there is one thing common to all people who dwell in Zion; we do not sever ourselves from the historic past and we do not deny the heritage of our forefathers. . . . [There are some] differences of nuance and approach . . . [among the Jewish thinkers but] the lowest common denominator is that no one can regard an apostate as belonging to the Jewish people.²⁸

²⁷ Time Magazine, Dec. 7, 1962, p. 54. Compare the statement issued at the 1937 meeting of the Central Conference of American Rabbis (reform rabbis), known as the Columbus Platform, containing these words: "Though we recognize in the group loyalty of Jews who have become estranged from our religious tradition, a bond which still unites them with us, we maintain that it is by its religion and for its religion that the Jewish people has lived." See Finkelstein, Ross & Brown, *The Religions of Democracy* 29 (1943).

²⁸ Time Magazine, Dec. 14, 1962, p. 60.

Justice Silberg, who is an outstanding jurist and a great scholar in both Jewish and secular studies, expressed sympathy for Father Daniel's desires to "identify himself with the people he loves."²⁹ However, he felt that to grant application for citizenship under the Law of Return would obliterate the historical meaning of the term "Jew" and deny all the spiritual values for which Jews had been persecuted and killed during various periods of the long exile. For the Justice, the petition meant sacrificing the historical continuity of a religion that had never been conceived as being a "partner" with any other religion. For Justice Silberg, "Thou shalt have none other Gods before me [Deut. 5:7]," expressed this exclusiveness.³⁰

Justice Berenson stated that he was inclined to grant Father Daniel's petition; however, he felt unable to do so because the court, in his opinion, should interpret the term "Jew" according to its popular meaning.³¹ Justice Cohen, dissenting, suggested that Father Daniel could not be deprived of his rights as a Jew. He thought that the Knesset, when enacting the Law of Return, intended to apply a subjective test under which the right to return to Israel was to be given to any person who declared that he was a Jew.³²

III. THE OPINION JUSTIFIED

A. *The Common Definition Of A Jew*

The Israeli Supreme Court properly chose to define a "Jew" according to the popular, secular interpretation of the term. Such a practical approach is in accord with the American rule that words in statutes and promulgations are construed with reference to the common and approved usage of the language.³³

Reference to dictionaries and encyclopedias is perhaps the best method of demonstrating the propriety of the court's definition of a Jew. In one respected source, a Jew is defined as:

1. A person of the Hebrew race; an Israelite. Originally a Hebrew of the kingdom of Judah, as opposed to those of the ten tribes of Israel; later, any Israelite who adhered to the worship of Jehovah as conducted at Jerusalem. Applied comparatively rarely to the ancient nation before the exile, but the commonest name for contemporary or modern representatives of the race; almost always connoting their religion and other characteristics which distinguish them from the people among whom

²⁹ *Ibid.*

³⁰ Lamerhav, Dec. 7, 1962, p. 10.

³¹ *Ibid.*

³² *Ibid.*

³³ See Crawford, *The Construction of Statutes* 754 (1940).

they live, and thus often opposed to *Christian* and (especially in early use) expressing a more or less opprobrious sense.³⁴

Also, the Catholic Encyclopedia, under the heading "Jews and Judaism," states, "Of these two terms, the former denotes usually the Israelites or descendants of Jacob (Israel) in contrast to Gentile races; the latter, the creed and worship of the Jews in contrast to Christianity, Mohammedanism, etc."³⁵

Interestingly, in most definitions the term "Jew" is used in contradistinction to the term "Christian." Conversely, when these sources define "Christian" as necessitating a belief in Jesus Christ,³⁶ they impliedly distinguish "Jews" and "Judaism." Thus, from these popular, secular expositions of modern word usage, it is apparent that the supreme court was well-substantiated in deciding that a "Jew" is not and cannot be a "Christian," such as Father Daniel purported to be.

B. Purpose Of The Immigration Laws

At the time of the founding of the State of Israel in 1948, it was anticipated by the Committee on the Constitution of the State Council of the Provisional Government that every Jew in the world

³⁴ 5 Oxford English Dictionary 576 (1933).

³⁵ 8 Catholic Encyclopedia 386, 399 (1910). Another description of a Jew is "originally one belonging to the tribe or kingdom of Judah; after the return from the Babylonian captivity, any member of the new Hebrew state, hence any person of the Hebrew race or people or any one whose religion is Judaism." Webster, New International Dictionary 1334 (2d ed. unab. 1951) (Emphasis added.). The Encyclopedia Britannica states that "the name came to mean the followers of Judaism, including in-born and proselytes, *the racial signification diminishing as the religious increased.*" 15 Encyclopedia Britannica 42 (1951) (Emphasis added.). Finally, in another dictionary, a Jew is defined as "a member of the Hebrew or Jewish people, belonging to the Mediterranean division of the Caucasian stock. Any person professing the religion of Judah. Originally a member of the tribe of the kingdom of Judah." 1 Britannica World Language Dictionary 720 (Funk & Wagnalls ed. 1954).

³⁶ All definitions of "Christianity" or "Christians" emphasize the belief in Jesus Christ, a belief which is antithetical to the strict Jewish monotheism. For example, a Christian has been described as

one who believes, or professes, or is assumed to believe, in Jesus Christ, and the truth as taught by Him; an adherent of Christianity. [Especially] one who has definitely accepted the Christian religious and moral principles of life; one who has faith in, and has pledged allegiance to God, thought of as revealed in Christ; one whose life is conformed to the doctrines of Christ. The disciples were called Christians first in Antioch. Webster, New International Dictionary 476 (2d ed. unab. 1951).

In a similar vein, another definition reads:

1. Relating to or derived from Christ or his doctrine. 2. Professing or following the religion of Christ. 3. Manifesting the spirit of Christ or his teachings. 4. Characteristics of Christianity or Christendom A disciple of Jesus Christ; one whose profession and life conform to the teaching and example of Christ; a member of a Christian church. One of a nation of which Christianity is the prevailing religion. 1 Britannica World Language Dictionary 244 (Funk & Wagnalls ed. 1954).

The Oxford English Dictionary states: "Of persons and communities: Believing, professing, or belonging to, the religion of Christ." 2 Oxford English Dictionary 390 (1933).

would have a right to immigrate to the homeland. Proposals concerning the proper approach to the problem ranged from an unlimited right, including the granting of citizenship to stateless Jews wherever they were and whenever they became Jews, to the granting of the right to only those who indicated their readiness to immigrate immediately. The results of the propositions were the 1950 Law of Return, which granted an automatic right of immigration to *all* Jews, and the 1952 Nationality Law, which, in addition to granting naturalization rights to all persons settling in Israel, gave automatic citizenship to Jews declaring their intention to become Israeli citizens by virtue of the Law of Return.

Historical reasons prompted Israel to extend to Jews everywhere the opportunity for automatic immigration. Such a policy guaranteed Jews the right to asylum in the event of political persecution or a refusal by the country of their origin to allow them to conserve their own culture, as Russia had done.³⁷ More important, this right of the dispersed Jews to immigrate not only preceded the State, but, in fact, built the State. It was a right rooted in history and one which kept the Jewish people from being emotionally separated from their homeland, even though they were physically separated. No Arab Knesset member disputed these principles. Even the law's most severe critic, the Arab Communist Tawfiq Tubi, acknowledged that the right of automatic citizenship should be granted to "returning" *Jewish* immigrants.³⁸

Embodiment of this right in positive law, such as the Law of Return and the Nationality Law, precipitated the problems concerning (1) the definition of the term "Jew" and (2) the relationship which was to exist between Israeli and non-Israeli Jews.³⁹ Nevertheless, since the right of "return" to Israel was based upon the religion and history of the Jewish people, the supreme court understandably limited the right to persons who had not rejected that religion. Thus, the court felt that since Father Daniel, the Catholic, had repudiated the tradition and principles of the Jewish religion by his conversion, he had lost his right to obtain automatic citizenship as a Jew. Of course, the court recognized that Father Daniel could still obtain citizenship by naturalization under the Nationality Law like any other non-Jewish immigrant.

C. Validity Of The Law Of Return And The Nationality Law

There should be little question about the validity in international

³⁷ Rackman, *Israel's Emerging Constitution 1948-1951*, at 156 (1955).

³⁸ 6 Divrei-Ha-Knesset 2035-37 (1952).

³⁹ Rackman, *op. cit. supra* note 37, at xi.

law of Israel's two major immigration laws. All states claim in legal theory the right to exclude aliens at will, affirming that such a right is an essential attribute of sovereign government. Both the courts of Great Britain⁴⁰ and the United States⁴¹ have approved that principle. Moreover, an examination of the immigration laws of various nations will show the complete power which each state exercises over those seeking to enter its boundaries.⁴² Thus, Israel's policies with respect to the Law of Return and the Nationality Law are obviously nothing extraordinary in the area of international law.

IV. CONCLUSION

The decision in the case of Father Daniel was not unjust to Jews or to non-Jews. The Supreme Court of Israel properly defined the term "Jew" by looking to the popular, secular concept, a concept in which the Jewish religion is an inextricable part of the status of being "Jewish." Moreover, as the court noted, a person should not be permitted to deny the basic tenets of a traditional order and still to reap the benefits from its success.

The decision does not show a discriminatory attitude on the part of Israel against non-Jewish persons. As Prime Minister Ben Gurion stated: "[I]n the State of Israel, Jews do not have any priority over non-Jewish citizens. The State of Israel is founded upon complete equality as far as obligations and rights are concerned for all citizens."⁴³ The exclusive right of Jews automatically to immigrate to Israel, as embodied in the Law of Return and the Nationality Law, is not a matter of discrimination. Rather, it is a matter of right, a right born of the history, persecution, and religion of a people.

The fact that justice was done can, perhaps, be understood from the statement of Father Daniel himself, given immediately after the judgment:

The profound earnestness in which the Justices have dealt with the case and their intentness on being just have given me deep satisfaction. . . . My rights as a future subject of Israel [under the non-Jewish naturalization portions of the Nationality Law] have not been affected in the least by the outcome of the case, and to exploit the occasion for vilifying the State of Israel is unwarranted.⁴⁴

⁴⁰ *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272.

⁴¹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Ekiu v. United States*, 142 U.S. 651 (1892).

⁴² See Starke, *An Introduction to International Law* 257 (4th ed. 1958).

⁴³ Peretz, *op. cit. supra* note 8, at 122.

⁴⁴ *Jerusalem Post*, Dec. 1962.

This statement, quite coincidentally, conveys the meaning of the saying in the Talmud: "Let him who comes from a court that has taken from him his cloak [to satisfy a judgment] sing his song and go his way [since having been justly tried he has not been divested of property but rather has been relieved of an ill-gotten object]."⁴⁵

⁴⁵ Sanhedrin 7(a) (Rashi), quoted in Silberg, *supra* note 4, at 307.